IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE, CIVIL JURISDICTION

FIRST APPEAL NO.1330 OF 1988

1. Nihalchand Vithaldas Parikh
since deceased through his legal heirs
1. Dilip Nihalchand Parekh
2. Smt. Mina H. Shah
3. Vijay Nihalchand Parekh
4. Smt. Sonal B. Mehta
5. Smt. Varsha J. Vora
6. Smt. Damayanti Nihalchand Parikh
(Amendment made as per order passed by Additional Registrar on 09/02/1999 in C.A.No.612/99)..**Appellants**

Versus

1. Pratapchandra Chhedalal Gupta
since deceased through his legal heirs :
1. Smt. Shashiben Pratapchandra Chhedalal
2. Bharat Pratapchandra Gupta
3. Vinit Pratapchandra Gupta
4. Sunil Pratapchandra Gupta
5. Smt. Sunita Vinod Agarwal
(As per order passed by Additional Registrar on 09/02/1999 in C.A. 612/99)

2. Gajanand Ramful Gupta
since deceased through his legal heirs :-
1. Smt. Shashiladevi Gajanand Gupta
2. Ashok Gajanand Gupta
3. Ajay Gajanand Gupta
4. Smt. Asha Vijay Gupta
5. Smt. Nisha Madhukant Agarwal
6. Smt. Sarita Devendas Sukla
7. Smt. Deepa Dinesh Jain
(As per order passed by the Additional Registrar on 09/02/1999 in C.A. 612/99) **..Respondents**

Mr. Jaidev Trivedi h/f. M.P. Vashi Advocate for the Appellants
Mr. R.S. Alange with Ms. Deepa Ahuja h/f. Mr. V.B. Naik Advocate for the Respondents

CORAM : S.R. SATHE,J.
DATED : 25/06/2007

ORAL JUDGEMENT :-

1. The appellant-original defendant in Suit No.4604 of 1972 has preferred this appeal against the judgement and order passed by the City Civil Court, Mumbai whereby the defendant and his agent and servants were restrained from using the suit cupboard and counter located on the waranda of Paramanand Hindu Refreshment Home outside the gala Nos. 7,8 and 9 opposite Malad Railway Station and the defendant was also directed to remove himself and his belongings from the said cupboard and counter and hand over the vacant possession of the same to Plaintiff. For the sake of convenience hereafter the parties shall be referred to as 'Plaintiff' and 'defendant'.

2. The brief facts giving rise to this appeal are as under :-

Plaintiff Nos. 1 and 2 are running a business in the name and style Paramanand Hindu Refreshment Home in partnership opposite to Malad Railway station. There is a platform (otla) of about 5' width running along wall of galas outside and in between the building and the road. Cupboards were fixed on the outside wall of the refreshment home. On 01/12/1953, Plaintiff No.1 and defendant entered into an agreement whereby the

cupboard fixed on the wall was allowed to be used by the defendant on defendant's agreeing to pay license fee of Rs. 1.75/- per day and Rs.1.50/- per day for electricity charges. The said cupboard was to be used by the defendant between 7.00 am to 9.00 pm and thereafter the key of the cupboard was to be handed over to the Plaintiff. The defendant was to run a circulating library by keeping the books in the said cupboard. Few months after the above mentioned agreement another agreement was executed between Plaintiff No.1 and defendant on 01/07/1954 whereby the defendant was allowed to use counter admeasuring 3' in height, 3' width and 8'6” in length kept in the open space in front of collapsible shutter of the said hotel by leaving 2' wide open space between the shutter and the counter. For the use of the said counter the defendant agreed to pay license fee of Rs. 1.25 per day and 25 paise per day towards electricity charges. The defendant was not allowed to increase the height of the counter or to cause any change in the counter. However, in October-1956, the defendant requested the Plaintiff to raise the height of the counter to 3.3/4' in stead of 3'. Accordingly, addendum was made to the agreement dated 01/07/1954. However, thereafter, the total license fee which was coming to Rs. 3 per day for

cupboard and counter was reduced to 2.50 per day. Whenever, the defendant used to make payment of license fee Plaintiff used to make entry about the same in the diary maintained by the defendant.

3. In the year 1970, the defendant shifted the counter towards the shutter encroaching on the 2' wide open space left open next to the shutter and extended breadth and height of the counter and enclosed it by fixing a weather shade above it. As the said act of the defendant was in total breach of the condition imposed in the agreement Plaintiff issued noticed dated 03/02/1971 through his advocate to the defendant and revoked his license in respect of the cupboard and the counter. The defendant gave reply dated 09/02/1971 and claimed tenancy in respect of the land on which the cupboard and counter were fixed. The defendant also stopped paying the license fee. Hence, Plaintiff filed suit in the City Civil Court in the year 1972 for the permanent injunction restraining the defendant from using the cupboard and the counter and for directing the defendant to remove himself and all his belonging from the cupboard and counter.

4. The defendant filed his Written Statement and

opposed the suit claim. Firstly, he contended that he is monthly tenant of Plaintiff No.1 in respect of the portion of the waranda adeasuring about 14' x 19' adjoining to Paramanand Hindu Refreshment Home, opposite Malad Station. According to him, he is in exclusive possession of the said portion admeasuring 14' x 9' and he is carrying on business in the said plot in the name and style, 'Vijay Pustakalaya'.

5. The defendant secondly contended that with a view to circumvent the provisions of the Bombay Rent Act, Plaintiff No.1 obtained two agreements dated 01/12/1953 and 01/07/1954. According to him, he had in fact refused to execute the said agreement but the Plaintiff No.1 represented and repeatedly assured him that the said agreement would not be used at all and the real transaction between the Plaintiff and him would be that of letting plot or ground admeasuring about 14' x 9' at monthly rent of Rs. 75/- and that the relationship between the Plaintiff No.1 and him i.e. defendant would be that of 'Landlord' and the 'Tenant'. According to defendant, Plaintiff also promised that the said agreements would not be used for any purpose except for raising any obligation of the provisions of Bombay Rent Act. Thus, according to defendant he was

put into an exclusive, uninterrupted and continuous possession of the plot or ground admeasuring 14' x 9'. Thus, according to defendant, two agreements relied on by the Plaintiff were sham and bogus and the same do not reflect the real transaction between the parties.

6. The defendant also contended that all the articles, furnitures, fixtures and fittings which are there belong to him and Plaintiff is not the owner of the same. The defendant contended that he was given portion of 14' x 9' as tenant and after putting cupboard and counter at the said place he started doing business.

7. The defendant also contended that in January-1972 he filed an application for fixation of standard rent in respect of the said plot in the Court of Small Causes at Bombay being No.RAN/67/SR/1972. Not only that but he also filed R.A. declaratory suit No.307 of 1977 against the present Plaintiff for declaration that the defendant is a monthly tenant of the Plaintiff in respect of the land admeasuring 14' x 9' and the agreement in question are bogus. The defendant also contended that he never handed over the key of the cupboard and counter as mentioned in the agreement and

all along he was in exclusive possession of the said plot and the cupboard and the counter and the present suit is filed by Plaintiff with a view to give counter blast to the proceeding initiated by the defendant.

8. The defendant also denied Plaintiff's claim with regard to the arrears of license fee and also denied the Plaintiff's claim regarding the breach of the agreement.

9. The defendant also contended that there was no question of revoking his license as the open space was given to him as a tenant. Hence, on all these grounds the defendant prayed for the dismissal of the suit.

10. On these pleadings, the then learned Trial Judge framed issues. In order to prove his case Plaintiff No.1 Pratapchandra Gupta examined himself and two other witnesses namely Laxmidad Chhatpar, Plaintiff's advocate who had drafted the agreement in question and witness Kapil Dev Agarwal and Engineer and Architect who visited the Paramanand Hindu Refreshment Home and took the measurement of the open space, hotel counter and the cupboard. The Plaintiff also produced the original two agreements as well as copy of the

notice issued to the defendant. As against this, the defendant examined himself and witness Haresh Adhwaryu an architect who also drew the plan of the premises showing the location of the hotel and counter and cupboard.

11. After considering the evidence adduced by both the parties, the learned Trial Judge came to the conclusion that the defendant has miserably failed to prove that open space admeasuring 14' x 19' or 14' x 9' was let out to him by the Plaintiff and that there was relationship of landlord and tenant or that defendant was sub-tenant of Plaintiff. The learned Trial Judge also held that the defendant has failed to prove that the agreements in question were sham and bogus and were not to be acted upon. According to the learned Trial Judge, Plaintiff established that the suit cupboard and the counter were given to defendant for use as licensee and for that defendant was to pay Rs.2.50/- per day and the defendant committed breach of the terms and conditions of the said agreement or license and the Plaintiff was justified in revoking the license. He, therefore, passed decree in favour of the Plaintiff.

12. Being aggrieved by the order passed by the

learned Trial Judge the defendant has filed the present appeal. In this appeal before me, Mr. Vashi learned Advocate for the defendant has urged 3 points. Firstly, he submitted that the learned Trial Judge has not properly appreciated the evidence on record. Secondly, he canvassed before me that the learned Trial Judge ought to have held that the agreements in question were got executed without giving knowledge about the contents of the same to the defendants and the same are sham and bogus. He also argued before me that the real transaction between the parties was of creating tenancy or rather sub-letting open space i.e. otla admeasuring 14' x 9' to the defendant. Lastly, he submitted that as the real transaction between the Plaintiff and the defendant was in respect of the tenancy rights the Bombay City Civil Court had no jurisdiction to try the present suit and as per the provision of Section 28 of the Bombay Rent Act and Section 41 of the Presidency Small Causes Courts Act 1882, the Small Causes Court Bombay has jurisdiction to try the present suit and the decree passed by the City Civil Court is illegal and without jurisdiction. He, therefore, submitted that the appeal be allowed and the suit be dismissed. As against this, Mr. Vinit Naik learned Advocate for the Plaintiff supported the judgement and order passed by the learned

Trial Judge. He submitted that the Leave and License agreements in question are duly proved by the Plaintiff and from the said agreements and evidence on record, it is clear that only suit cupboard and counter were given to the defendant for use on certain terms and conditions and as defendant committed breach of those terms the Plaintiff was entitled to revoke the license and get possession of the counter and the cupboard. He also submitted that the subject matter of the suit can not be called 'the premises' as contemplated under the Bombay Rent Act and as such there is no substance in the argument that City Civil Court has no jurisdiction to try the suit. He, therefore, submitted that the appeal be dismissed.

13. It is not in dispute that Plaintiff Nos. 1 and 2 are carrying on business in the name and style of M/s. Paramanand Hindu Refreshment Home in Gala Nos. 7,8 and 9 situated opposite Malad Railway Station and they are tenants of the said premises. It is an admitted fact that there is one cupboard affixed to the wall of the said Paramanand Hindu Refreshment Home and the said cupboard was given to the defendant for carrying on his business of circulating library. It is also an admitted fact that in front of the said hotel there is a

platform or Otla and on that Otla, there is one counter and defendant is allowed to do his business of the said circulating library from the said counter. It has also come on record that initially the said counter was of wood and subsequently, it was prepared of metal. It is the case of the Plaintiff that the said cupboard and the counter are owned by him and he has given the same to the defendant for using it for defendant's business.

14. According to the defendant the said cupboard and counter are not owned by the Plaintiff but they are owned by him. However, if we peruse the evidence on record it is very clear that the defendant has not adduced any evidence as to when the cupboard and the counter were prepared ?, who prepared it ?, what amount was spent for it ? etc. If really the defendant would have prepared the said cupboard and the counter then defendant would have certainly adduced evidence in that behalf. In the absence of such evidence when we find that in the agreements dated 01/12/1953 and 01/07/1954 it is specifically mentioned that the cupboard and the counter mentioned in the agreements respectively are owned by the Plaintiff and when we find that the defendant has executed the said agreement, due weightage shall have to be given to the recitals with

regard to ownership of the cupboard and counter in the said agreement and it must be held that from the preponderance of probabilities and the circumstances on record, it is clear that the Plaintiff is the owner of the cupboard and the counter in question.

15. It is the contention of the defendant that though he has signed the agreement in question, he was not aware about the contents of the said agreement and the same were not explained to him. In order to substantiate this, an attempt is made to show that the defendant does not know English. However, it appears that when certain documents were shown to him in the cross-examination, he did not state that the said documents are in English and as such he has no knowledge about the same. Besides this, we find that the Written Statement of the defendant is in English and the same is signed by the defendant in English. So, the defendant has failed to prove that he has no knowledge about the contents of the agreements in question.

16. It must be noted that the defendant has taken the contention that when Plaintiff asked him to execute the agreement, he was in fact not ready to do the same

but as the Plaintiff told him that the said agreements are required for the purpose of Income Tax and for showing the said agreements in Mamlatdar's kacheri, he ultimately executed the agreement, the defendant has not adduced any convincing evidence to substantiate this contention. So, the same can not be accepted. On the contrary, we find that it is the contention of the defendant that agreements in question have been executed with a view to circumvent provisions of Bombay Rent Act. According to him, the Plaintiff in fact gave open space admeasuring 14' x 19' in front of Plaintiff's hotel Paramanand Hindu Refreshment Home to him on the rental basis and the real transaction between the parties was that of subletting the open space by Plaintiff to him. Firstly, it must be noted that the main point to be decided in this appeal is whether the real transaction between the parties was of giving open space on the basis of leave and license or on lease to the defendant or whether the defendant was only given permission to use the cupboard and the counter.

17. It is true that though the defendant has taken the contention that open space situated in front of Plaintiff's hotel was given to him the contentions

taken by the defendant in this behalf are not consistent, at least so far as the area of the open space alleged to have been given to the defendant. At one stage, the defendant has contended that portion admeasuring 14' x 19' out of Otla was given to him while at some other place he contended that portion of about 14' x 9' out of the said Otla is given to him. If we see the two agreements in question then we find that it is nowhere specifically mentioned therein that open space or some portion of Otla situated in front of the Plaintiff's house was given to the defendant either on the basis of leave and license or on rental basis. So, we have to scrutinize the entire evidence on record and consider the said evidence and the conduct of the parties and to find out whether leave and license was granted to the defendant in respect of the counter or in respect of the open space out of the said Otla on which the counter was fixed. While considering this question, it would be worthwhile to see the exact averments in agreement in question. In the agreement dated 01/12/1953, there are following recitals :-

> *"WHEREAS the owner is entitled to a cupboard in front of Paramanand Hindu Refreshment Home standing in front of the said hotel Otla, AND WHEREAS he is the sole and absolute owner of the said cupboard where he has been doing his*

business AND WHEREAS the second party has approached him to grant him Leave and License to use and occupy the said cupboard for doing the business AND WHEREAS the owner has agreed to grant the necessary permission AND WHEREAS the said grant is subject to the terms and conditions mentioned hereunder :"

18. It is also mentioned therein that the owners have allowed the Licensee to occupy the said cupboard and on every day after the business hours, the defendant shall hand over key of the said cupboard to Plaintiff and that if the defendant fails to hand over the key, Plaintiff will have right to put lock on the defendant's lock. It must be noted that in plaint the Plaintiff has specifically averred that the said cupboard was affixed to the wall and this statement has gone unchallenged. So, it does appear that so far as cupboard is concerned, the same is on the wall of the Plaintiff's business premises and the same is not actually kept on the Otla. Naturally, question arises whether leave and license was granted in respect of this cupboard that is in respect of this movable property or whether leave and license was created in respect of any immovable property forming part and parcel of the Plaintiff's premises. Shri Naik, learned

Advocate for the Plaintiff has drawn my attention to a case **M/s. A.K. Porbunderwala and Sons V/s. Gulam Hussain Alibhai Nathani and another AIR 1974 Bombay 288** wherein the learned Single Judge of this Court has made the following observations :-

> *"A stall which is like a cupboard hanging on the outside wall of the shop premises in the possession of the defendants and abuts on the footpath, could not be said to be "premises" as defined in Section 5(8) of the Act. It is too hazardous to conclude that the stall can be called fittings affixed to the building for the more beneficial enjoyment of the building or part of the building. Therefore, the special court could not have jurisdiction to try the suit and it is the City Civil Court alone which has jurisdiction to entertain and try the suit."*

19. The learned Advocate for the defendant could not point out that the ratio of the above cited ruling is not applicable to the present case. So, taking into consideration the peculiar facts of the case and the above cited ruling, I am of the view that so far as the cupboard affixed on the wall of Plaintiff's premises which is given to the defendant to use is concerned, the Plaintiff has rightly revoked defendant's license

to use the said cupboard and learned City Civil Judge has rightly directed the defendant to hand over the said cupboard to Plaintiff.

20. So far as other agreement dated 01/12/1954 is concerned, the same is duly proved by the Plaintiff and his witness Advocate Mr. Laxmidad Chhatpar. In this agreement, there is following recital :-

> *"WHEREAS the owner is entitled to a counter of 3' height x 3' breadth and 8½' length in front of the door of 'Paramanand Hindu Refreshment Home' on the said Hotel Otla, situated about 2' away from the door line and the wall on Anand Road side; AND WHEREAS the second party has approached to grant him leave and license to use and occupy the said Counter for doing the business AND WHEREAS the owner has agreed to grant the necessary permission AND WHEREAS the said grant is subject to the terms and conditions mentioned hereunder:-*
> *1. The owner shall allow the Licensee to occupy the counter situated in front of the door of 'Paramanand Hindu Refreshment Home' on the said hotel Otla, situated about 2' away from the door line and the wall on Anand Road side, for a day after the expiry of the business hours the possession of the*

said Counter shall remain with the owner."

21. Shri Vashi, learned Advocate for the defendant strenuously argued before me that in the instant case though, agreement is drafted in a manner to give impression that only permission is given to the defendant to use the counter i.e. movable property but in fact, the real transaction was that of allowing the defendant to carry on his business of circulating library from the said counter i.e. from some portion of the Otla. Thus, according to him, this is a clear case where leave and license is created in respect of not only the counter but also in respect of the land or the floor below the said counter i.e. leave and license in respect of immovable property. It is only with a view to save the transaction from the clutches of Bombay Rent Act, in the agreement it is tried to be shown that only counter i.e. movable property is given to the defendant on leave and license basis. Firstly, it must be noted that admittedly, the counter in question is not small one but it is of 3' height, 3' width and 8½' length. It is not a case where the defendant was provided only with this counter which could be removed by him whereever he liked and was allowed to use the same for his business. It is very clear from the

material on record that counter was kept or fixed just in front of the Plaintiff's shop and on the otla which was part and parcel of the Plaintiff's tenanted premises. The very fact that the defendant was directed to occupy the said counter and to do business from the said counter and was not allowed to move the same, in fact, goes to show that the defendant was given a right to carry on his business of circulating library in the portion of 3' x 8'6”. Though, an attempt is made by the Plaintiff to show that leave and license was granted in respect of movable property i.e. the counter, in fact, it is not so. The right is given to the defendant to carry on business on the immovable property which is of the Plaintiff. So, the agreements in question is nothing but a leave and license to carry on business of the defendant on a particular portion of the Otla i.e. in respect of immovable property. It is only with a view to save Plaintiff from the clutches of the Rent Act, it is not mentioned in the agreement that portion admeasuring 3' x 8'5” out of Otla was given to the defendant and instead it is mentioned that counter kept on the said portion is given. The agreement dated 01/07/1954 was drafted in a fashion to camouflage the real transaction of creating leave and license in respect of the immovable property. Incidently, it must

be noted that the Plaintiff has permitted the defendant even to take separate electric connection and meter in respect of the said open space that is in respect of the said counter. Even if we see the photograph which are produced on record they certainly show that the counter in question is fixed on some portion of the Otla and the said portion is in fact, given to the defendant for doing his business. So, I have no hesitation to hold that though in the agreement in question it is mentioned that leave and license in respect of counter is granted, in substance leave and license is granted in respect of the floor or land admeasuring 3' x 8'6" below the said counter alongwith the counter.

22. Shri Vashi, learned Advocate for the defendant canvassed before me that once it is held that the Plaintiff has filed the suit as a licensor against the defendant licensee for the possession of the counter and the portion below the counter then the City Civil Court has in fact no jurisdiction to try the said suit, in view of the provision of section 41 of the Presidency of Small Causes Act, 1882 and Section 28 of the Bombay Rent Act. In order to substantiate this proposition he has placed reliance on a case **Eknath**

Vithal Ogale V/s. Mansukhlal Dhanraj Jain 1988(2) Bombay Cases Reporter 9 wherein this Court (CORAM : M.L. PENDSE,J.) has made following observations :-

> *"When A had alleged the relationship of a licensor and licensee and the relief claimed in substance related to recovery of possession, it would be the special Court that would have jurisdiction to decide the suit. Amended Section 41(1) clearly prescribes that Court of Small Causes have jurisdiction to entertain and try all suits and proceedings between the licensor and the licensee relating to the recovery of possession of any immovable property situated in Greater Bombay."*

23. It would worthwhile to see what section 41(1) says, it runs as follows :-

> *"41(1) Notwithstanding anything contained elsewhere in this Act but subject to the provisions of sub section (2), the Court of Small Causes shall have jurisdiction to entertain and try all suits and proceedings between a licensor and licensee, or a landlord and tenant, relating to the recovery of possession of any immovable property situated in Greater Bombay, or relating to the recovery of the license fee or charges or rent therefor, irrespective of the value of the subject matter of such*

suits or proceedings."

Thus, having regard to the facts and circumstances of the case and the position of Law, I have no hesitation to hold that the real or true transaction between the parties to the suit was in respect of giving immovable property admeasuring 3' x 8'6" out of Otla to the defendant on leave and license basis and as such the City Civil Court had in fact no jurisdiction to entertain the suit in respect of the possession of the said property. In my opinion, the learned Trial Judge has failed to find out the real nature of the transaction between the parties to the suit. He has failed to consider, as to what right in substance was given to the defendant and in respect of which property. As a result, he reached to a wrong conclusion and decreed the suit in respect of possession of the counter. In my opinion, the said order directing the defendant to hand over the possession of the counter and thereby, indirectly to hand over the possession of the land below the counter is not legal and as such needs to be set aside to that effect. Hence, I pass the following order :-

O R D E R

The Appeal is partly allowed.

The order passed by the Trial Court in respect

of the cupboard affixed on the wall of Paramanand Hindu Refreshment Home is confirmed and the order with regard to the counter located on the varanda of Paramanand Hindu Refreshment Home is set aside.

The defendant, his agents, servants or any other person or persons claiming under or through him are restrained from using the cupboard affixed on the wall of Paramanand Hindu Refreshment Home outside the gala Nos. 7,8, and 9, opposite Malad Railway Station, Malad (East), Bombay from 01/08/2007.

The defendant to remove all his belongings from the said cupboard and hand over the vacant possession of the same to Plaintiff on or before 31/07/2007.

Plaintiff's suit for injunction and possession in respect of the counter located on the waranda of Paramanand Hindu Refreshment Home, outside gala Nos. 7,8 and 9, opposite Malad Railway Station, Malad (East), Mumbai stands dismissed.

Under the circumstances of the case, parties to bear their own costs of this appeal.

(S.R. SATHE,J.)